

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No.: 10-CV-0012-L
Criminal No. 02-CR-2912-L

ORDER:

**1) DENYING MOTION PURSUANT
TO 28 U.S.C. § 2255 WITH
PREJUDICE [ECF NO. 184];**

**2) DENYING MOTION TO
INSPECT GRAND JURY MINUTES
AND MOTION TO DISMISS
INDICTMENT [ECF NO. 212];**

**3) DENYING MOTION TO
WITHDRAW PLEA OF GUILTY
AND AMEND [ECF NO. 214];**

**4) DENYING MOTION FOR
APPOINTMENT OF COUNSEL AND
TO CONDUCT DISCOVERY [ECF
NO. 225.]**

**5) DENYING CERTIFICATE OF
APPEALABILITY**

SYED SAADET ALI FARA SHAH, aka
Syed Mutsjab Shah,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petitioner, Syed Mutsjab Shah (“Petitioner”) proceeding *pro se*, filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. The Court has

1 reviewed the motion and the record and, for the reasons set forth below, denies
2 Petitioner's Motion.

3 **I. BACKGROUND**

4 On March 30, 2006, Petitioner pled guilty without a plea agreement to one count of
5 conspiracy to distribute heroin and hashish in violation of 21 U.S.C. §§ 841(a)(1) and one
6 count of conspiracy to provide material support to terrorists in violation of 18 U.S.C. §§
7 2339B(a)(1) and (d). On September 25, 2006, this Court sentenced Petitioner to a term of
8 imprisonment of 225 months.

9 On September 28, 2007, the Ninth Circuit Court of Appeals affirmed Petitioner's
10 conviction and sentence. On December 21, 2009, Petitioner filed a motion pursuant to 28
11 U.S.C. § 2255 in which he contends he received ineffective assistance of counsel and that
12 his conviction was obtained through a coerced confession. By Order dated January 5,
13 2010, the Court dismissed Petitioner's motion as untimely because it was not filed within
14 the applicable period of limitations. Petitioner appealed the decision to the Ninth Circuit
15 Court of Appeals on April 9, 2010. On January 23, 2012, the appellate court vacated this
16 Court's order, and remanded with instructions to allow Petitioner an opportunity to
17 demonstrate that his § 2255 motion was timely filed. On August 30, 2014, this Court
18 found that extraordinary circumstances caused Mr. Shah's untimeliness, equitable tolling
19 applied, and deemed Mr. Shah's 2255 petition timely filed. The Court now turns to the
20 merits of Mr. Shah's 2255 petition.

21 **II. DISCUSSION**

22 "A claim of ineffective assistance [of counsel] may be used to attack the
23 voluntariness and hence the validity of a guilty plea." *United States v. Keller*, 902 F.2d
24 1391, 1394 (9th Cir. 1990); see *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985). To prevail
25 on an ineffective assistance of counsel claim, a defendant must show that counsel's
26 performance was deficient and that this deficient performance prejudiced the defendant.
27 *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Jeronimo*, 398 F.3d
28 1149, 1155 (9th Cir. 2005). In the context of guilty pleas, to satisfy the "prejudice"

1 requirement “the defendant must show that there is a reasonable probability that, but for
2 counsel’s errors, he would not have pleaded guilty and would have insisted on going to
3 trial.” *Hill*, 474 U.S. at 59. Defense counsel’s conduct is presumed to be reasonable.
4 *Strickland*, 466 U.S. at 689.

5 Petitioner alleges attorney Nietor provided ineffective assistance when he: (1) lied
6 to Petitioner about the plea by promising him a sentence of 57 months if he signed the
7 agreement; (2) failed to translate the plea agreement and had Petitioner sign an agreement
8 he did not understand; (3) threatened to withhold legal services if Petitioner did not sign
9 the plea agreement; (4) threatened Petitioner with a sentence of “life or worse” if he did
10 not sign the plea agreement; (5) coerced Petitioner into signing the plea agreement by
11 telling him that the Government and the Court did not care if he was innocent; (6)
12 coerced Petitioner to plead guilty by telling him that if he did not plead guilty he might
13 get killed because “the government can arrange for accidents to happen to [Petitioner]” in
14 custody. (Motion 6.) Petitioner further alleges he received deficient performance
15 because his attorney: (1) failed to challenge the Court’s jurisdiction over the charged
16 offenses; (2) failed to challenge the Government’s ability to conduct an undercover
17 investigation in a foreign land (Hong Kong); (3) failed to challenge the lawfulness of
18 Petitioner’s extradition to the United States; (4) failed to seek dismissal of the indictment
19 on jurisdictional grounds; (5) failed to pursue an entrapment defense on Petitioner’s
20 behalf; (6) failed to challenge the Government’s breach of the plea agreement; and (7)
21 failed to persuade the Court to give Petitioner a lower sentence. (Petitioner’s
22 Memorandum of Law 2.) Petitioner filed additional allegations after the Government
23 responded to his original Petition emphasizing that the interpreter at his change of plea
24 hearing omitted key points so Petitioner did not fully understand (1) he was facing a ten
25 year minimum, and (2) his right to insist on his innocence may be impaired. (Petitioner’s
26 Reply at 4.)

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1 *A. Plea Agreement*

2 Petitioner makes numerous arguments concerning a plea agreement, including that
 3 attorney Nietor: (1) lied to him about the plea agreement by promising him a sentence of
 4 57 months if he signed the agreement; (2) failed to translate the plea agreement; (3)
 5 threatened to withhold legal services; (4) threatened Petitioner with a sentence of “life or
 6 worse”; (5) coerced Petitioner by telling him that the Government and the Court did not
 7 care if he was innocent. (Mot. 6.) In support, Petitioner attached a Draft Plea
 8 Agreement, in which he claims it is evident that his attorney promised he will receive a
 9 sentence of less than 10 years. (Supp. Mem. at 3; Ex A.)

10 The Government responds that there was no plea agreement in this case, therefore,
 11 “it is a factual impossibility for attorney Nietor to have acted in a constitutionally
 12 deficient manner with respect to a plea agreement, as no such agreement existed in this
 13 case.” (Response in Opposition at 5.)

14 The Court agrees. There is no merit to Petitioner’s claims that attorney Nietor lied
 15 to him regarding his potential sentence as an inducement to sign the plea agreement,
 16 failed to ensure he understood the terms of the agreement, threatened to withhold legal
 17 services if Petitioner did not sign the agreement, or otherwise coerced him into signing
 18 the plea agreement, as there was no plea agreement in this case. Accordingly, the Court
 19 **DENIES** Petitioner’s claims of ineffective assistance of counsel related a plea agreement
 20 as moot.

21 *B. Guilty Plea*

22 By entering a guilty plea without a plea agreement, Petitioner preserved his right to
 23 collaterally attack his judgment and sentence under 28 U.S.C. § 2255. The right to
 24 collaterally attack a sentence under § 2255 is statutory in nature. *United States v. Pruitt*,
 25 32 F.3d 431, 433 (9th Cir. 1994); *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.
 26 1993). “[A] plea of guilty entered by one fully aware of the direct consequences . . .
 27 must stand unless induced by threats (or promises to discontinue improper harassment),
 28 misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by

1 promises that are by their nature improper as having no proper relationship to the
2 prosecutor's business (e.g. bribes).'" *United States v. Kaczynski*, 239 F.3d 1108, 1114
3 (9th Cir. 2001) (quoting *Brady v. United States*, 397 U.S. 742, 755 (1970)) (alteration in
4 *Kaczynski*). "It goes without saying that a plea must be voluntary to be constitutional."
5 *Id.* A plea is considered voluntary when it "'represents a voluntary and intelligent choice
6 among the alternative courses of action open to the defendant.'" *Id.* (quoting *North*
7 *Carolina v. Alford*, 400 U.S. 25, 31 (1970)). A guilty plea is void when it is "induced by
8 promises or threats which deprive it of the character of a voluntary act." *Id.* (internal
9 quotations omitted).

10 In assessing the voluntariness of the plea, the court must accord great weight to
11 statements made by the defendant contemporaneously with his plea. *Chizen v. Hunter*,
12 809 F.2d 560, 562 (9th Cir. 1986). The representations of the defendant, his lawyer, and
13 the prosecutor, as well as the judge's findings in accepting the plea, "constitute a
14 formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431
15 U.S. 63, 73-74 (1977). "Solemn declarations in open court carry a strong presumption of
16 verity. The subsequent presentation of conclusory allegations unsupported by specifics is
17 subject to summary dismissal, as are contentions that in the face of the record are wholly
18 incredible." *Id.* at 74; *see also Kaczynski*, 239 F.3d at 1115 ("We give 'substantial
19 weight' to [petitioner's] in-court statements.") (quoting *United States v. Mims*, 928 F.2d
20 310, 313 (9th Cir. 1991)).

21 First, Petitioner argues that attorney Nietor induced him to plead guilty by
22 promising that he would be sentenced to 57 years. (Mot. 6; Reply 3-4.) Petitioner claims
23 that he was particularly susceptible to the pressure placed on him by attorney Nietor
24 because Petitioner suffers from a mental impairment and does not speak English,
25 requiring him to rely on the services of an interpreter who he claims did not provide the
26 exact words of the Court but instead paraphrased everything in a way that deleted key
27 points including that he was facing a 10 year minimum sentence and that he had a right to
28 persist in his claim of innocence. (Reply 4.) Next, Petitioner claims that attorney Nietor

1 threatened to withhold legal services if Petitioner did not plead guilty. (Mot. at 6.)
2 Finally, Petitioner claims that he pled guilty because attorney Nietor led him to believe
3 that if he didn't plead guilty and insisted on going to trial he might "get killed" because
4 "the government can arrange for accidents to happen... in custody." (*Id.* at 6.)
5 Petitioner moves to withdraw his guilty plea on the grounds that he was provided
6 ineffective assistance of counsel because his attorney failed to investigate the facts
7 underlying the case, he was coerced and was misled to enter a guilty plea.¹ (Mot.
8 Withdraw Plea at 1 [ECF NO. 214.])

9 In response, the Government directs the Court's attention to the plea colloquy
10 where Petitioner stated he understood that the minimum sentence he would receive would
11 be ten years on Count 1 of the Indictment, the drug conspiracy charge. (Resp. 5.)
12 Moreover, the Government notes that attorney Nietor stated in his sworn declaration that
13 he would never have promised Petitioner that he would receive a 57 month sentence if he
14 entered a guilty plea but instead told him that under the Sentencing Guidelines Petitioner
15 was facing a sentence well in excess of 57 months considering the offenses with which he
16 was charged. (*Id.*) The Government argues that there is no support in the record for
17 Petitioner's claim that attorney Nietor threatened to withdraw his legal services if
18 Petitioner did not plead guilty, and notes that Petitioner stated he was content with his
19 attorney's services during the plea colloquy. (*Id.* 6.) In fact, the Government notes that
20 Petitioner stated he was entering the guilty plea of his own free will and at the advice of
21

22
23 ¹ Petitioner also contends he was denied his right to counsel under Article 36 of the Vienna
24 Convention. (*Id.*) Article 36 of the Convention was drafted to "facilitat [e] the exercise of consular
25 functions" and provides that if a person detained by a foreign country "so requests, the competent
26 authorities of the receiving State shall, without delay, inform the consular post of the sending State" of
27 such detention, and "inform the [detainee] of his righ[t]" to request assistance from the consul of his
28 own state. Art. 36(1), 21 U.S.T., at 100-101; *see also Medellín v. Texas*, 552 U.S. 491, 499 (2008).
Petitioner appears to be contending that the United States government should have advised him of his
right to seek assistance from the consul of Pakistan, however this claim is unrelated to the issue before
the Court, which is the effectiveness of Petitioner's appointed attorney, Mr. Nietor, therefore the Court
declines to address the merits of this claim.

1 his attorney. (*Id.*) As for Petitioner's claim that attorney Nietor told him he might be
 2 killed while in custody if he didn't plead guilty, the government argues the claim is
 3 absurd and points to attorney Nietor's sworn declaration in which he states that he never
 4 told Petitioner that if he chose to take the case to trial he might get killed. (*Id.* at 7.)
 5 Because no threat was ever made by attorney Nietor, there is nothing in the record to
 6 support the allegation, according to the government. (*Id.*)

7 Looking to the statements made contemporaneously to his plea, the Court finds no
 8 merit to Petitioner's claim that Nietor coerced him into pleading guilty, threatened him,
 9 or hinted at having him killed. Moreover, there is no support in the record for Petitioner's
 10 contention that he did not understand the terms of the plea due to deficient translation
 11 into his native language. In fact, the record supports a contrary position.

12 At the plea hearing, Petitioner acknowledged he understood the charges against
 13 him, and was "happy" with the services of his attorney:

14 Court: Are you satisfied with the services of your counsel?

15 Defendant: Yes, I am happy.

16 (Resp. Ex. A, Tr. of Plea Hr'g at 14.)

17 The Court informed Petitioner that he had a right to persist in his plea of not
 18 guilty, yet Petitioner chose to admit his guilt:

19 Court: Okay. Now, are you pleading guilty today because you are, in fact,
 20 guilty of count 1, conspiracy to distribute heroin and hashish, and
 21 count 3, conspiracy to provide material support to a designated
 22 terrorist organization?

22 Defendant: Oh, what did he say?

23 Court: Are you pleading guilty here today because you are, in fact, guilty of
 24 count 1 and 3?

24 Defendant: Okay.

25 Court: Well, you need to say yes or no.

26 Defendant: Yes. At the advice of my attorney, I am accepting it, that I am guilty.

27 Nietor: Your honor, may I have a moment?

28 Court: Yes, please

(Counsel conferring with defendant)

Nietor: Thank you, your honor.

1 The Court: Okay. Well, let me cover that and make sure he is clear. Are you
2 pleading guilty because you are, in fact, guilty as charged?

3 Defendant: Yes.

4 Court: All right. The clerk will accept the plea.

5 Clerk: Now that you have been advised of your rights, the charges against
6 you and the possible sentence, how do you plead to counts 1 and 3 of
7 the indictment: are you guilty or not guilty.

8 Defendant: Yes. Guilty.

9 *Id.* at 14–16.

10 Petitioner further acknowledged that the court had the power to impose a sentence
11 that was either more severe or less severe than the sentence called for by the guidelines.

12 *Id.* at 12. When asked whether he had any questions regarding sentencing or sentencing
13 guidelines, Petitioner, through his interpreter, responded: “Tell the judge that I
14 understood everything.” *Id.* at 13. The Court found Petitioner entered the guilty plea
15 freely and voluntarily; he understood the elements of the crime and the maximum
16 penalty; and there was a factual basis for the plea. *Id.* at 20.

17 Although Petitioner now contends that his attorney initially promised that he would
18 only receive 57 months custody, attorney Nietor stated in a declaration:

19 I never promised Petitioner that he would receive a 57 month sentence if he
20 entered a guilty plea. Rather, I informed him of the applicable United States
21 Sentencing Guideline calculations which, given the offenses Petitioner was
22 alleged to have committed, call for the imposition of a sentence well in
23 excess of 57 months. I also informed Petitioner that the Court would make
24 the ultimate sentencing decision in his case and that I was unable to predict
25 the sentence the Court would impose.

26 (Resp.’s Ex. C, Nietor Decl. ¶ 4.)

27 Petitioner’s assertion that he would not have pleaded guilty but for his attorney’s
28 coercion and threats is not supported by any evidence in the record. Such a bare
29 allegation is insufficient to set aside his guilty plea. *See United States v. Sutton*, 794 F.2d
30 1415, 1422 (9th Cir. 1986). Accordingly, having considered the substantial weight
31 accorded Petitioner’s on-the-record statements, Petitioner’s challenge to the voluntariness
32 of his plea because of his counsel’s performance is without merit. *See Strickland*, 466

U.S. at 687. For these reasons, Petitioner's request to withdraw his guilty plea because he was allegedly denied effective assistance of counsel is **DENIED**.

C. Jurisdiction, Extradition, Entrapment and Investigation

Petitioner alleges attorney Nietor rendered deficient performance by failing to file motions: (1) challenging the Court's jurisdiction over the charged offenses; (2) challenging the government's ability to conduct an undercover investigation in a foreign land (Hong Kong); and (3) challenging the lawfulness of Petitioner's extradition to the United States.²

The government counters that attorney Nietor correctly determined that the referenced motions would be meritless because: (1) the Court had jurisdiction over both Petitioner and the charged offense, (2) the manner by which a defendant is brought to trial does not affect the government's ability to try him; and (3) law enforcement officials from the United States can conduct a portion of their activities outside the territorial bounds of the United States when the foreign government cooperates. (Resp. 8.)

i. *Jurisdiction*

Petitioner contends that the Court lacked jurisdiction because the alleged crimes took place outside the geographical and territorial jurisdiction of the United States and therefore the indictment should be dismissed and his conviction vacated. (Pet. at 3.) He further contends that counsel was ineffective for failing to raise the jurisdictional issue. (*Id.* at 2.) The government claims attorney Nietor correctly determined that a motion to

² Petitioner argues that attorney Nietor should have posited an entrapment defense because Petitioner was enticed to travel from Pakistan to Hong Kong by government agents who purchased airline tickets for him, gave him pocket money and covered the hotel expense. (Mem. P&A 7.) However, an entrapment defense was not a proper ground for a pretrial motion, as attorney Nietor states he told Petitioner in his declaration. Nietor said "I explained the law of entrapment to Petitioner and told him that such a claim was a trial defense, as opposed to a pretrial motion. I further explained to Petitioner that if he chose to enter a guilty plea he would be foregoing his right to present an entrapment defense." (Nietor Dec. at 4 [ECF No. 220-3].) Attorney Nietor was under no obligation to raise the meritless legal argument concerning entrapment because Petitioner pled guilty, therefore, Petitioner's claim fails. *See Baumann v. United States*, 692 F.2d 565, 573 (9th Cir. 1982) (The failure to raise a meritless legal argument does not constitute ineffective assistance of counsel.)

1 dismiss the indictment for a lack of jurisdiction was meritless. (Govt. Resp. 8.)

2 Generally, a challenge to the sufficiency of an indictment must be raised prior to
3 trial, but “[a] motion that the court lacks jurisdiction may be made at any time while the
4 case is pending.” Fed.R.Crim.P. 12(b)(2). Under Section 2255, this Court has authority
5 to determine whether it had jurisdiction to impose the conviction and sentence Petitioner
6 received. *See United States v. Addonizio*, 442 U.S. 178, 185(1979). Here, the Court
7 properly exercised jurisdiction over Petitioner because the crimes with which he was
8 charged, conspiracy to distribute heroin and hashish into the United States in violation of
9 21 U.S.C. §§ 846 and 841(a)(1), and conspiracy to provide material support to terrorists,
10 in violation 18 U.S.C. §2339B(a) and (d) are offenses against the laws of the United
11 States. *See* 18 U.S.C. §3231 (“The district courts of the United States shall have original
12 jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the
13 United States.”) Further, many of the events that formed the basis of the conspiracy
14 charged in the Indictment occurred within the Southern District of California, therefore
15 venue was proper in this Court. *Whitfield v. United States*, 543 U.S. 209 (2005).
16 Accordingly, it would have been futile for attorney Nietor to file a motion challenging
17 subject matter jurisdiction and therefore, his representation was not deficient. *Bauman*,
18 692 F2d at 573 (“The failure to raise a meritless legal argument does not constitute
19 ineffective assistance of counsel.”)

20 *ii. Undercover investigation*

21 Petitioner argues that his attorney provided deficient representation by failing to
22 challenge United States law enforcement officials’ authority to conduct the undercover
23 investigation in a foreign land without the host country’s knowledge and consent. (Mot.
24 2.) The government disagrees, claiming that attorney Nietor correctly decided to forgo
25 filing a motion claiming that the United States improperly conducted part of the
26 investigation in Hong Kong. (Resp. 8.)

27 United States agents involved in the investigations of international organizations
28 seeking to smuggle drugs into the United States may, when foreign governments are

1 willing to cooperate, conduct a portion of their activities outside the territorial bounds of
2 the United States. *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991).
3 Attorney Nietor wisely did not challenge the extraterritorial investigation of the alleged
4 offenses because Petitioner was charged with conspiracy to import heroin and hashish in
5 violation of 21 U.S.C. §952, 960 and 963 and the investigation of these international
6 crimes necessarily required some action in a foreign country. *See United States v.*
7 *Larsen*, 952 F.2d 1099, 1100 (9th Cir. 1991); *Brulay v. United States*, 383 F.2d 345, 350
8 (9th Cir. 1967). The government of Hong Kong cooperated to the extent that they
9 executed the warrant, thereby implicitly condoning the investigation that led to the
10 charges. Therefore, Petitioner's claim that his attorney provided deficient performance
11 for failing to challenge the extraterritorial investigation of his crimes lacks merit.

12 iii. *Extradition*

13 Petitioner was arrested on September 20, 2002, in Hong Kong after meeting with
14 United States undercover agents and his co-conspirators to finalize the details of the
15 transaction. Officers from the Hong Kong police department placed Petitioner under
16 arrest pursuant to a provisional arrest request filed by the United States, after which
17 interviews were conducted. Petitioner initially invoked his right to counsel, but a month
18 later, in October 2002, United States law enforcement officers returned to Hong Kong to
19 conduct an interview with him. Subsequently, the United States Marshals service
20 transported Petitioner to the Southern District of California.

21 Petitioner claims his attorney rendered deficient performance by failing to
22 challenge his extradition, arguing that the double criminality principle dictates that the
23 crime with which he is charged be punishable as a serious crime in both countries in
24 order for him to be extradited, which was not true here. (Pet. 4.) According to Petitioner,
25 the government of Hong Kong and Interpol gave him a written statement in which they
26 asserted that the alleged crimes against Petitioner were not considered serious crimes
27 under the laws of Hong Kong and the statement declares there was a lack of supporting
28 evidence to substantiate the allegations by the United States. (*Id.*) Petitioner contends

1 that the letter was given to the U.S. Marshals, who then gave it to the prosecutors after
 2 Petitioner saw it, and was never introduced into evidence or given to defense counsel
 3 which violated his due process rights. (*Id.*)

4 The government responds that any challenge to Petitioner's extradition would have
 5 been frivolous because the Supreme Court has long held that the manner by which a
 6 defendant is hailed into court does not affect the government's ability to try him. (Resp.
 7 8.) Therefore, even if the extradition had been flawed, which it wasn't, it could not have
 8 formed the basis of an ineffective assistance of counsel claim. (*Id.*)

9 A "statute or extradition treaty is a prerequisite to extradition." *Cornejo-Barreto*
 10 *v. Seifert*, 218 F.3d 1004, 1009 (9th Cir.2000). Extradition consists of "the surrender by
 11 one nation to another of an individual accused or convicted of an offense outside of its
 12 own territory, and within the territorial jurisdiction of the other, which, being competent
 13 to try and to punish him, demands the surrender." *Terlinden v. Ames*, 184 U.S. 270, 289
 14 (1902). The federal extradition statute provides, in relevant part:

15 Whenever there is a treaty or convention for extradition between the United
 16 States and any foreign government ..., any justice or judge of the United
 17 States ..., may, upon complaint made under oath, charging any person found
 18 within his jurisdiction, with having committed within the jurisdiction of any
 19 such foreign government any of the crimes provided for by such treaty or
 20 convention ..., issue his warrant for the apprehension of the person so
 charged ...

21 18 U.S.C. § 3184.

22 Prior to July 1, 1997, Hong Kong was under the control of the United Kingdom,
 23 therefore the treaty with the United Kingdom of Great Britain and Northern Ireland, U.S.-
 24 U.K., 28 U.S.T. 227 governed extradition proceedings, and recognized the principle of
 25 dual criminality. *Oen Yin-Choy v Robinson*, 858 F.2d 1400, 1404 (9th Cir. 1988) ("Under
 26 the principle of dual criminality, no offense is extraditable unless it describes conduct
 27 which is criminal in both jurisdictions.") "Dual criminality, for extradition purposes,
 28

1 does not require that offense in foreign country have identical counterpart under laws of
2 United States, rather, dual criminality requires only that acts alleged constitute crime in
3 both jurisdictions.” *Bozilov v. Seifert*, 983 F.2d 10 (9th Cir. 1992).

4 During the commission of the present offenses, Hong Kong had become the Hong
5 Kong Special Administrative Region (“HKSAR”), an “inalienable part” of the People’s
6 Republic of China, but distinct for purposes of “arrangements with foreign states for
7 reciprocal juridical assistance.” *Cheung v. United States*, 213 F.3d 82, 84 (2nd Cir. 2000).
8 As a result of this political shift, the “Agreement with Hong Kong for the Surrender of
9 Fugitive Offenders” (“Agreement”) dictated the circumstances under which extradition
10 was authorized. The Agreement specifies that the HKSAR will surrender any person
11 who is found in Hong Kong to the United States where that person is wanted by the
12 United States for prosecution in respect to listed offenses, which includes “[o]ffenses
13 against the laws relating to drugs, including narcotics. . . and offenses relating to the
14 proceeds of drug trafficking” *Agreement for the Surrender of Fugitive Offenders*, Dec.
15 20, 1996, U-S- H.K., S.Treaty Doc. No. 105-3, Art 2 (vii). The treaty enumerates certain
16 offenses and states that the fugitive offenders will be surrendered for any of these
17 offenses provided the offense at issue is punishable by more than one year of detention
18 under the laws of both jurisdictions. *See In re Extradition of Chan Seong-I*, 346 F.Supp.
19 1149, 1159 (D. New Mexico 2004).

20 Petitioner was charged with conspiracy to import and distribute heroin and hashish,
21 crimes related to narcotics which carried sentences punishable by more than one year of
22 detention. *See* USSG § 2D1.1; Sentencing Table (Nov. 2005). Therefore, the Agreement
23 authorized the government of Hong Kong to arrest Petitioner and arrange for extradition
24 to the United States. Despite Petitioner’s claims that he saw a document in which the
25 government of Hong Kong stated the case lacked physical evidence, corroborating
26 statements, and sufficient evidence of the more serious allegations, this assertion is
27 contradicted by the conduct of the officials in the HKSAR who found sufficient evidence
28 to arrest him pursuant to a provisional arrest warrant filed by the United States. In light

1 of the fact that the Agreement provides sufficient legal support for Petitioner's
2 extradition, attorney Nietor did not provide deficient representation by failing to
3 challenge Petitioner's extradition because such a motion would have been meritless.
4 *Bauman*, 692 F2d at 573. For the foregoing reasons, the Court **DENIES** Petitioner's
5 ineffective assistance of counsel claims related to jurisdiction, extraterritorial jurisdiction
6 and extradition.

7 D. *Sentencing challenges*

8 Petitioner alleges that attorney Nietor rendered ineffective assistance of counsel for
9 his failure to challenge the government's breach of the plea agreement and failure to
10 persuade the Court to give Petitioner a sentence within the range it sentenced his co-
11 defendant in the same case. (Mot. 2.) Instead, Petitioner alleges the Court relied on a
12 prior conviction from another country to increase his sentence by 180 months more than
13 his co-defendant, which his attorney did not challenge. (Supp. Doc. at 6 [ECF No. 232.])

14 In contrast, the government contends that although the "Court ultimately imposed a
15 225 month sentence in this case, attorney Nietor strongly advocated on Petitioner's behalf
16 at the sentencing hearing, requesting a sentence of 120 months" which was the lowest
17 possible sentence the Court could impose due to the mandatory minimum penalties
18 associated with Petitioner's conviction on Count 1 of the Indictment. (Resp. 9.) In light
19 of the fact that Petitioner's counsel advocated for the lowest possible sentence he
20 adequately and properly represented Petitioner's interests during the sentencing
21 proceedings in the government's view. (*Id.*)

22 Petitioner's contention that his attorney rendered deficient performance for failing
23 to challenge the plea agreement is moot because there was no plea agreement in this case.
24 In addition, the sentencing transcript indicates that Petitioner's attorney argued
25 effectively for every possible factor that could mitigate the term of his sentence. *See*
26 *Lambright v. Schriro*, 490 F.3d 1103, 1115-1116 (9th Cir. 2007) (counsel has a duty to
27 investigate and present mitigating evidence during sentencing.) Attorney Nietor first
28 noted that Petitioner was a minor participant in the agreement, and should be given a

1 minor role reduction to reflect that his involvement began over two years after the initial
2 investigation began and that he did not lead the negotiations, but merely agreed by
3 acquiescence. (Reporter's Transcript at 5, February, 10, 2006 [ECF NO. 206.]) Next,
4 Petitioner's attorney argued that the Court should consider Petitioner's significant
5 physical and psychological ailments which would make any lengthy incarceration
6 exceptionally difficult for him. (*Id.* at 5-6.) He pointed out that Petitioner was a low-
7 functioning individual and that his mental health issues had caused him to "lay in the
8 fetal position at MCC, urinate in public, hear voices." (*Id.* 6.) Attorney Nietor noted for
9 the Court that Petitioner's co-defendants had each received 57 months, and with the
10 minor role adjustment, Petitioner's sentence would be in the 63-78 month range, but that
11 if the Court imposed the minimum mandatory sentence, Petitioner would receive 120
12 months, a significant disparity from his codefendants sentences. (*Id.* at 6.) Petitioner's
13 counsel concluded that "any sentence over 120 months would be excessive and quite
14 probably be a life sentence for Mr. Shah." (*Id.* 6-7.) The record belies Petitioner's
15 contention that his prior conviction for heroin smuggling in the United Kingdom
16 increased his sentence without objection by his attorney. Instead, the Court stated that
17 the prior conviction did not score for purposes of a sentence enhancement, and that as a
18 result, Petitioner remained in a Criminal History Category 1 instead of a category 3,
19 which would have increased his potential sentence considerably. (*Id.* at 16.)

20 For the above reasons, the Court finds that Petitioner's counsel did not provide
21 deficient performance during sentencing proceedings, and these claims fail. *Schriro*, 490
22 F.3d at 1115-1116.

23 **III. MOTION TO INSPECT GRAND JURY MINUTES AND DISMISS** 24 **INDICTMENT**

25 Petitioner moves to dismiss the indictment as defective on the grounds that the
26 government knowingly introduced perjured testimony and deceived the grand jury. (Mot.
27 to Inspect at 1 [ECF NO 212.]) Petitioner claims the government failed to properly
28 instruct the grand jury and that the grand jury proceedings were defective because the

1 evidence was not legally sufficient to establish jurisdiction. (*Id.*) In his view, an
2 examination of the grand jury minutes is needed to allow Petitioner to effectively present
3 his claims. (*Id.* at 2.)

4 Petitioner does not indicate what government testimony was allegedly perjured during
5 the grand jury proceedings, therefore, it is impossible for this Court to determine whether
6 review of the grand jury proceedings minutes is warranted. To the extent Petitioner is
7 claiming that there was insufficient evidence to establish jurisdiction for the offense
8 charged, the Court considered this claim above and determined that jurisdiction was
9 proper. Petitioner has failed to demonstrate that inspection of the grand jury minutes is
10 required, and further, that dismissal of the indictment on these grounds is necessary.
11 Accordingly, the Court **DENIES** Petitioner's motion.

12 **IV. MOTION TO CONDUCT DISCOVERY AND APPOINT COUNSEL**

13 Petitioner contends that the complexity of his case, coupled with his indigency, and
14 mental disability make it impossible for him to conduct the discovery required to support
15 his claims properly without help from appointed counsel. (Mot. Discovery at 4-5.) In
16 order to fully develop his ineffective assistance of counsel and actual innocence claims
17 for the Court, Petitioner argues that he needs assistance of counsel to conduct
18 investigation and interrogatories to gather evidence crucial to the claims and allegations
19 presented in the motion, including his claim that his plea was coerced and his assertion
20 that counsel promised him a 57 month sentence. (*Id.* at 5.)

21 Any financially eligible person who is seeking relief under section 2255 of title 28
22 may be appointed counsel whenever the Court determines that the interests of justice so
23 require. 18 U.S.C §3006A(2). Appointment of counsel is mandatory only when
24 evidentiary hearings are required. *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir. 1984).
25 "A judge may, for good cause, authorize a party to conduct discovery under the Federal
26 Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and
27 principles of law. If necessary for effective discovery, the judge must appoint an attorney
28 for a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A."

1 Rules Governing §2255 Proceedings, Rule 6(a), 28 U.S.C.A. foll. §2255. Rule 6(b)
2 states: “A party requesting discovery must provide reasons for the request. The request
3 must also include any proposed interrogatories and requests for admission, and must
4 specify any requested documents.” *Id.*

5 In support of his request, Petitioner claims that he needed the assistance of counsel
6 to conduct discovery and obtain the declaration of his co-defendant, Muhammad Abid
7 Afridi, which would have provided support for his claim that he was induced to plead
8 guilty by the false representation of his attorney that he would only receive 57 months in
9 custody. (Mot. at 5.) Petitioner does not include any other specific requests for
10 discovery, but alludes to evidence and interrogatories that would help him develop his
11 claims more fully. As demonstrated above, there is no evidence in the record that
12 Petitioner’s counsel told him that he would only receive 57 months custody, and in fact,
13 the sentencing transcript demonstrates that counsel argued for every conceivable variance
14 to bring down the sentence Petitioner faced. Even if the Court appointed counsel for
15 Petitioner, and he was able to procure Afridi’s declaration, it would not alter the
16 landscape upon which Petitioner was sentenced nor invalidate counsel’s declaration in
17 which he stated that he did not promise a 57 month sentence to Petitioner. While the
18 Court acknowledges that Petitioner’s indigency weighs in favor of appointing counsel, he
19 has effectively represented himself by filing numerous documents including his Petition,
20 Memorandum of Points and Authorities, Supplemental Memorandum, Motion to Inspect
21 Grand Jury Minutes, and Motion to Dismiss Indictment for lack of jurisdiction.
22 Moreover, Petitioner raised complex arguments in support of his Petition and Motion to
23 Dismiss, including the theory of dual criminality in regard to his extradition. *Weygandt*
24 *v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)(“In deciding whether to appoint counsel in a
25 habeas proceeding, the district court must evaluate the likelihood of success on the merits
26 as well as the ability of the petitioner to articulate his claims pro se in light of the
27 complexity of the legal issues involved.”) Because Petitioner has effectively represented
28 himself, and the evidence he seeks would not change the balance of the analysis

1 regarding his claims, the Court declines to exercise its discretion to appoint counsel and
2 permit discovery. Accordingly, the Court **DENIES** Petitioner's Motion to Appoint
3 Counsel and Motion for Discovery.

4 **V. CERTIFICATE OF APPEALABILITY**

5 A certificate of appealability is authorized "only if the applicant has made a
6 substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To
7 meet this standard, Petitioner must show that "jurists of reason could disagree with the
8 district court's resolution of his constitutional claims or that jurists could conclude the
9 issues presented are adequate to deserve encouragement to proceed further." *Miller-El v.*
10 *Cockrell*, 537 U.S. 322, 327 (2003). Petitioner does not have to show "that he should
11 prevail on the merits. He has already failed in that endeavor." *Lambright v. Stewart*,
12 220 F.3d 1022, 1025 (9th Cir. 2000) (internal quotation omitted).

13 Petitioner has not made a substantial showing that he was denied a constitutional
14 right and the Court is not persuaded that jurists could disagree with the Court's resolution
15 of his claims or that the issues presented deserve encouragement to proceed further.
16 Therefore, a certificate of appealability is **DENIED**.

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